

**BEFORE THE MERIT EMPLOYEE RELATIONS BOARD
OF THE STATE OF DELAWARE**

TUESDAY S. BANNER,)	
)	
Employee/Grievant,)	
)	DOCKET No. 13-04-589
v.)	
)	ORDER OF DISMISSAL
DEPARTMENT OF HEALTH AND SOCIAL SERVICES,)	
DIVISION FOR THE VISUALLY IMPAIRED,)	
)	
Employer/Respondent.)	

After due notice of time and place, this matter came to a hearing before the Merit Employee Relations Board (the Board) at 10:30 a.m. on Wednesday, January 29, 2014, at the Public Service Commission, Cannon Building, 861 Silver Lake Boulevard, Dover, DE 19904.

BEFORE Martha K. Austin, Chair, John F. Schmutz, and Victoria D. Cairns, Members,
a quorum of the Board under 29 *Del. C.* §5908(a).

APPEARANCES

W. Michael Tupman
Deputy Attorney General
Legal Counsel to the Board

Deborah L. Murray-Sheppard
Board Administrator

Kevin R. Slattery
Deputy Attorney General
on behalf of the Department of
Health and Social Services/Division
of the Visually Impaired

BACKGROUND

A hearing was convened by the Merit Employee Relations Board (MERB) on Wednesday, January 29, 2014, to hear the appeal of Tuesday Banner (Grievant) against the Department of Health and Social Services (Department). The Grievant was employed by the Department in the position of Administrative Specialist I in the Division for the Visually Impaired. By letter dated March 1, 2013, the Grievant was dismissed from her employment. She filed an appeal directly to MERB on or about April 11, 2013, requesting her appeal be heard only by MERB.

Prior to the January 29, 2014 hearing before the Board, a Prehearing Order was issued on December 2, 2013, as a result of a prehearing conference convened by MERB's counsel on November 26, 2013. Both the Grievant and counsel for the Department of Health and Social Services participated in the prehearing conference.

The hearing in this matter was previously scheduled for December 5, 2013, commencing at 9:00 a.m. On the morning of December 5, 2013, the full Merit Employee Relations Board assembled to hear the appeal at 9:00 a.m. Upon finding the Grievant not present, the MERB Administrator was able to remotely access her email and found the following communication from the Grievant addressed only to the Administrator:

I am sending this correspondence with the hope that you receive it in time to inform the Board that I will not be able to attend today's hearing in lieu of the fact that I have an emergency involving one of my 6-year old sons, which requires my presence.

I am not aware of MERB's protocol for emergencies, however, if MERB cannot or will not postpone today's hearing I reserve the right to appeal that decision. Hopefully, a postponement can be scheduled for a later date, that will enable me to attend.

Please inform of the MERB's decision as soon as possible.

Tuesday Banner

Thereafter, the Board voted to grant the Grievant a continuance. The hearing was rescheduled for 9:00 a.m. on Wednesday, January 29, 2014, and the parties were so advised by letter dated December 12, 2013. The Grievant was further notified that the subpoenas she had requested would be reissued prior to the hearing and that the Board had been advised by the Agency that one of her witnesses had retired from state service and was deceased. The subpoenas were reissued on January 9, 2014. Both the Grievant and counsel for the Department were notified the subpoenas had been reissued for the January 29, 2014 hearing.

There was a winter storm during the early morning hours of January 29, 2014. State offices in Kent and Sussex County delayed opening until 10:00 a.m. (a two-hour delay). Employees were expected to report to work and operations to begin at 10:00 a.m. A quorum of the Board, Board staff and the Agency's counsel were assembled and prepared for hearing at 9:00 a.m., as scheduled.

At approximately 8:17 a.m., staff in the MERB office in Wilmington called the Administrator by telephone to relay that the Grievant had called at 8:06 a.m. to "find out the status of the hearing", citing that she was aware that the state offices in Kent and Sussex County had delayed opening for two hours. At the Board's direction, the Grievant was advised by return phone call at 8:35 a.m. that the hearing would begin at 10:00 a.m. The MERB Administrator also sent an email to both parties at 8:45 a.m. which stated: "Due to the delay in opening of state offices in Kent County, the MERB hearing will begin at 10:00 a.m. this morning."

Thereafter, the Board's Administrator received a second email from the Grievant (again only addressed to the Administrator) which had a "sent" time of 9:10 a.m., which stated:

In accordance with the State wide email issued this morning before 8:00am that informed there would be a two hour delay of all state offices in Kent and Sussex Counties in lieu of inclement *[sic]* weather. Therefore, I am confused as to why the hearing would not fall into that two hour delay as well and begin at 11:00am instead of 10:00am. I am forwarding

this email at this time to inform the Board that I will be leaving my home in Bear Delaware at 9:30am and expect to arrive at the hearing approximately at 10:30am, in lieu of the State wide email issued before 8:00 am that informed me of the two hour delay.

When I received your email at 8:44am I had already rearranged my schedule according to the state's email about delays.

Please inform the necessary parties.

Tuesday S. Banner

In an effort to provide the Grievant every opportunity to be appear, the Board did not convene until 10:37 a.m. The Grievant failed to appear.

DISCUSSION

Delaware courts have held that when a party appeals to an administrative board but does not appear for the hearing, the board may dismiss the appeal for failure to prosecute. *Ringer v. Dept. of Transportation*, Nos. 06-06-360/361 (Sept. 24, 2008), (citing *Han v. Red Lobster, C.A.* No. 03A-04-015-FSS, 2004 WL 1427008, at p. 1 (Del.Super., June 25, 2004). While the Board may show some degree of leniency to a *pro se* litigant, it cannot excuse the litigant for failure to appear without explanation, particularly when the Board has granted previous continuances at the grievant's request and where the grievant had clearly and directly acknowledged notice of the hearing.

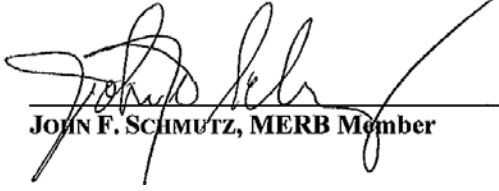
The Grievant failed to appear to be heard and to present evidence in support of her appeal. Consequently, this appeal is dismissed.

DECISION AND ORDER

It is this 4th day of February, 2014, by a unanimous vote of 3-0, it is the Decision and Order of the Board to dismiss Banner's appeal for failure to prosecute.



MARTHA K. AUSTIN, MERB Chairwoman



JOHN F. SCHMUTZ, MERB Member



VICTORIA D. CAIRNS, MERB Member

APPEAL RIGHTS

29 *Del. C.* §5949 provides that the grievant shall have a right of appeal to the Superior Court on the question of whether the appointing agency acted in accordance with law. The burden of proof on any such appeal to the Superior Court is on the grievant. All appeals to the Superior Court must be filed within thirty (30) days of the employee being notified of the final action of the Board.

29 *Del. C.* §10142 provides:

- (a) Any party against whom a case decision has been decided may appeal such decision to the Court.
- (b) The appeal shall be filed within 30 days of the day the notice of the decision was mailed.
- (c) The appeal shall be on the record without a trial de novo. If the Court determines that the record is insufficient for its review, it shall remand the case to the agency for further proceedings on the record.
- (d) The court, when factual determinations are at issue, shall take due account of the experience and specialized competence of the agency and of the purposes of the basic law under which the agency has acted. The Court's review, in the absence of actual fraud, shall be limited to a determination of whether the agency's decision was supported by substantial evidence on the record before the agency.

Mailing date: **February 4**, 2014

Distribution:

Original: File

Copies: Grievant
Agency's Representative
Board Counsel
MERB Website